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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1357

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Local 134, International Brotherhood of Electrical Workers AFL-CIO, and Local 165, International Brotherhood of Electrical Workers, AFL-CIO, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a decision of the National Labor Relations Board

which found that the petitioners engaged in conduct in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, Title 29 USC Section 158b. The Illinois Bell Telephone Company intervened in the action at the Court of Appeals.

OPINIONS BELOW.

The opinion of the Seventh Circuit is officially reported as Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Local 165, International Brotherhood of Electrical Workers, AFL-CIO, 433 F. 2d 302. It is also printed in the Appendix to this Petition. The decision of the National Labor Relations Board plus the recommended order of the Trial Examiner appear at 179 NLRB No. 33; 72 LRRM 1422, and is printed in this Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit affirming the Order of the National Labor Relations Board was entered October 23, 1970. (App. 3.) A timely Petition for Rehearing was denied on November 16, 1970. (App. 4.) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is the proviso of Section 8(b)(4)(B) which excepts primary picketing from the coverage of that clause, applicable when the union picketed a location at which a functioning part of the primary employer's operations were located?

2. Can Section 8(b)(4) of the Statute, which requires a finding that the Union had as an object of its picketing, the cessation of business with the primary employer, be vio-

lated when, as here Illinois Bell Telephone Company, the primary employer, is a public utility which has a monopoly upon the rendering of telephone communications and is thus the only supplier of such services?

3. Was the alleged secondary employer, here Winston Muss, an ally of the primary, Illinois Bell Telephone Company, thus turning the picketing into permissible primary activity?

4. Were the petitioners denied due process as a result of the Board's finding a violation of the statute based on the Moore Dry Dock theory, when the primary employer, Illinois Bell Telephone Company, refused to produce books and records in response to subpoenaes issued at the request of the petitioners, which records would relate directly to elements of the Moore Dry Dock Theory?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Constitution of the United States.

Amendment [V].

"No person shall be * * *, nor be deprived of life, liberty, or property, without due process of law; * * *

Statute Involved.

Title 29, United States Code, Section 158(1).

"158(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on

any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

STATEMENT OF THE CASE.

Beginning on May 8, 1968, and continuing through until September 23, 1968, approximately 12,000 employees of Illinois Bell were on strike. (Tr. 131[1] and App. p. 7 fn. 2.) Prior to the beginning of the strike those employees who went on strike, performed services for Illinois Bell at a condominium building of the Winston-Muss Corporation (known as Tower No. 3), by placing the main cable from a manhole, located on or near Kedzie Avenue, across the property of Muss to the basement of Tower No. 3. (Charging Party Exhibit I and Tr. 131 and 104.)

Muss and Bell engaged in joint cooperative efforts at the earliest stages of the project and, beginning with the architect, worked together closely to locate the Illinois Bell cables. (Tr. 125.) The close cooperation continued when Winston Muss requested a rerouting of the main cable, put

1. All citations refer to NLRB transcripts and/or exhibits.

in by the strikers prior to the strike, because of a lower cost to Winston Muss. (Tr. 122-123; 129; 130.)

The main cable and all other cables and telephones remained the property of Illinois Bell Telephone Company. (Tr. 106.) Winston Muss merely provided an easement for the main cable and other Illinois Bell wiring. (See Charging Party Exhibit I.) This cooperation resulted in a reduction in cost to the Illinois Bell Telephone Company. (Tr. 77-78.) The location of the various cables and other wires were according to the blueprints prepared by Illinois Bell. (Tr. 81 and Charging Party Exhibit 1.)

After the commencement of the strike, Illinois Bell had, at least some of the struck work done by utilizing its supervisory personnel and employees of various subsidiaries of the Bell System from throughout the country. (Tr. 82 and 105.) These strikebreakers who were doing the struck work were engaged in performing all phases of the work that the strikers normally performed. (Tr. 104.) These strikebreakers would use unmarked cars in the course of their doing the struck work. (Tr. 107.) The strikebreakers would perform their work on the struck work at all hours of the day and night, including weekends. (Tr. 82 and 100.)

On Saturday, August 24, 1968, Bell sent a crew of twelve strikebreakers to Muss Tower No. 3. (Tr. 82.) These strikebreakers were assigned to install the main cable in the basement of Tower No. 3, to run cable and wires through the building to apartments. (Tr. 83-91.) Other tradesmen were working in the building on this day. (Tr. 33 and 86.)

The strikebreakers returned to the building on Monday, August 26, 1968 to hook up the telephones in the owners' individual apartments. (Tr. 33; 88.) When these telephones were hooked up they became an operating part of the Bell system by direct connection with the central service office. (Tr. 88.)

The Union began picketing the Muss Tower No. 3 on August 27, 1968. The pickets were located at the entrance to a private driveway but remained on the public street known as Kedzie Avenue. (See Tr. 13 and 17 and General Counsel Exhibit No. 2.) Picketing continued at Tower No. 3 until on or about September 9, 1968.

Any deliveries that were not made, were as far as is known, because the driver of the delivery truck voluntarily determined not to cross the picket line. (Tr. 20.)

The project manager solicited from the pickets on the scene, the name of a union representative to speak to, regarding the picketing. (Tr. 24-25.) After he was informed, the project manager then telephoned to union agent Ahern and asked the reason for the pickets. (Tr. 26.) Ahern responded by saying that the work that was performed since the weekend, particularly on the main cable, was the reason for the pickets. (Tr. 26 and 27.) Ahern pointed out to the project manager that the work performed by the strikebreakers was of a permanent, rather than of a temporary nature. (Tr. 27-28.) The project manager testified that Ahern told him that the pickets would continue until such time as the permanent installation that the strikebreakers installed was disconnected and removed from the job. (Tr. 30-32.) When the project manager offered to make payment to the union to discontinue the picketing the union agent refused and said, "Positively not. That no deals could be made." (Tr. 32.)

The company continued to schedule work for the completion of the permanent installation, which was started on the weekend of August 24-26, continuously through the month of September.[2] (Tr. 108, 109, 112, 127 and 128 and

2. The company witness Brown originally testified that no additional work was scheduled after Monday, August 26, but he later contradicted his testimony when shown the work order which he himself worked on and completed on or about September 4.

Respondent Exhibit 1.) All installations of telephones were of a permanent nature rather than of a temporary nature. (Tr. 136.) The company witness did not know if there was any effort made to provide temporary aerial service to the alleged emergency cases prior to the time the permanent installations were made. (Tr. 134.)

The company installed in excess of twenty-five (25) to thirty (30) telephones through the month of September. (Tr. 128.) The Union cooperated with allegedly sick apartment owners by not objecting to the installation of telephones when they were informed by the various occupants of apartments that they were suffering from cardiac or other emergency problems. (Tr. 52.)

The only company records made available in response to the Petitioner's subpoena, was a work order showing installation of telephones in an apartment owned by Arthur Rubloff Company, a rental agent, and which was occupied by Rubloff's maintenance employee. (Respondent Ex. 1.) There is no evidence that the maintenance man was a sick individual or that he had some other professional status, and to the contrary, the project manager believed him to be an able bodied individual. (Tr. 68.) The company contended that no other records of work orders including main cable or telephone installations were available because they were either lost or destroyed.[3] (Tr. 101, 142, and 144.) The company admitted, however, that sometimes these records are kept for years. (Tr. 142.) Service orders and billing records would reflect the date of installation work. (Tr. 134 and 135.)

On August 28, 1968, an unfair labor practice charge alleging violations of Section 8(b)(4)(b) were filed by Illinois Bell against the International Brotherhood of Elec-

3. It must be remembered that the company witness testified that it would also be possible to determine the date of installation of a telephone from the service order or from the billing records kept by the company. (Tr. 134-135.)

trical Workers, AFL-CIO[4] and its Local's 134 and 165. On September 3, 1968, the regional office of the Board petitioned for an injunction in the District Court for the Northern District of Illinois, Eastern Division. On September 10, 1968, the cause was stricken from the calendar of the court because the picketing had ceased. A complaint was issued against respondents on September 12, 1968. Hearing was held March 26 and 27, 1969. The Trial Examiner issued a decision on June 11, 1969, recommending that violations of Section 8(b)(4)(i) and (ii) (B) be found. On October 17, 1969, a three member panel of the Board adopted the Trial Examiner's decision without comment.

The United States Court of Appeals for the Seventh Circuit, in a Per Curiam decision, affirmed by relying on the Trial Examiner's decision, with a comment only on the due process contention of Petitioner.

REASONS FOR GRANTING THE WRIT.

This Court should issue its writ of certiorari to review the decision of the Seventh Circuit in this case for the following reasons:

1. The language of Section 8(b)(4)(B) specifically provides that any primary strike or primary picketing is excluded from the coverage of that Section. This court has found that picketing by employees of the struck, primary employer, at the facilities of the primary employer, falls outside the prohibition of Section 8(b)(4)(B). *Steelworkers (Carrier Corp.)* v. *N. L. R. B.*, 376 U. S. 492 and *Electrical Workers (General Electric)* v. *N. L. R. B.*, 366 U. S. 667. The Court has reaffirmed the propriety of these decisions as late as January 12, 1971, in its decision in *N. L. R. B.* v. *Local 825 Operating Engineers* (Burns and Row, Inc.),

4. The International Union was dismissed from the complaint at the hearing by motion of the General Counsel of the Board.

39 Law Week 4097, 76 LRRM 2129. The decisions of the trial examiner, the National Labor Relations Board, and the Court of Appeals are in conflict with the Court's decisions.

2. Since Section 8(b)(4) of the statute requires, as an element of the violation, a finding that the union has as an object of its picketing, the cessation of business with the primary employer, it must be possible for the alleged secondary employers to cease doing business with the primary. In this case, Illinois Bell Telephone Company is a utility which has a monopoly upon the providing of telephone communications in the Chicago area. Thus a complete termination of its business relationship is not possible. Although, the Court's recent decision in the case of *N. L. R. B.* v. *Local 825 Operating Engineers* (Burns and Row, Inc.) 39 Law Work 4097, 76 LRRM 2129 found a violation of Section 8(b)(4)(B) when a secondary object, was shown, it also said that when the disruption is slight, a failure to meet the "cease doing business" requirement may occur. The degree of disruption was not considered by the trial examiner, the National Labor Relations Board, or the Court of Appeals in the instant case. Finally, the Court, in the *Burns & Row* decision (*supra*) did not indicate whether the rationale of that case would have the same application to a monopoly as it does to private business concerns, and the Court should specifically decide that question.

3. The primary employer, Illinois Bell, and the alleged secondary, Winston Muss, engaged in a close degree of cooperation in the providing of telephone service to the owners of apartments, without monetary compensation being received by Winston Muss. Neither the trial examiner, nor the N. L. R. B., nor the Court of Appeals considered this court's decision in the case of *National Woodwork Manufacturers Association* v. *N. L. R. B.*, 386 U. S. 612 in which the Court stated that an employer may

be an ally of the struck primary when he voluntarily chooses to place himself in the vortex of the primary dispute. The failure of the decisions below to find, consider, or rule on an ally situation is in conflict with this Court's decision in the *National Woodworkers* decision.

4. The evidentiary rules known as the Moore Dry Dock Theory have been recognized by this Court as an aid to the National Labor Relations Board and the Courts in determining whether a union was engaged in illegal secondary activity. *Electrical Workers (General Electric)* 366 U. S. 667. However, in that decision the Court warned the Board against an automatic application of these rules, on a per se basis, to find a violation. In the instant case, the Board through the trial examiner, found a violation because of Petitioner's alleged failure to satisfy all elements of the Moore Dry Dock criteria. Found to be lacking were, one, that the primary employer be engaged in its normal operations and, two, that primary employer be present during the time of the picketing. These findings were based upon an alleged absence of evidence from the Petitioners after the trial examiner improperly shifted the burden of proof from the General Council to the Petitioners. Further, the union had attempted to have produced the evidence of the presence of strike breakers at the situs, namely the records of Illinois Bell Telephone Company, but the company refused to produce such records. The alleged violation was predicated upon an automatic application of the Moore Dry Dock theory in conflict with both the spoliation presumption and the Court's decisions that failure to produce evidence favorable to the accused is a violation of the due process concept. The resultant deprivation of due process to the Petitioners should be reviewed by this Court.

I.

One of the most vexing problems facing the Court in deciding the propriety of picketing has been balancing the rights of the Union, as set forth in Section 8(b)(4)(B) of the statute permitting primary picketing, against the prohibited pressure on innocent secondary employers. The Court has long found that where a construction site situation exists and the union is clearly attempting to bring pressure to bear upon secondary employers, a violation of the statute has taken place. *Labor Board* v. *Denver Building and Construction Trade Council,* 341 U. S. 675 (1951). That is the authority relied upon by the Trial Examiner in the instant case.

However, when the Court was later faced with the situation where the primary employer's permanent facilities were involved, it found that the picketing constituted primary activity which was protected under the statute. *Electrical Workers (General Electric)* v. *N. L. R. B.,* 336 U. S. 667 (1961). The Court there noted that the union members were picketing their employer at the location where the primary employer was permanently located. Thus any effect upon neutral secondary employers was the consequence of valid primary picketing.

The court reaffirmed this finding even though the picketing took place a slight distance from the primary's facilities, as long as it was within the vicinity and concerned the day to day operations of the primary employer. *Steelworkers (Carrier Corp.)* v. *N. L. R. B.,* 376 U. S. 492 (1964). The common factor in both cases was the permanent location of the primary employer and the fact that the day to day operations of the company were being picketed. See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369 at p. 388.

The Court in the *Jacksonville Terminal* case reiterated the fact that, in the area of common situs picketing there is really no general formula which can be applied. Treatment of this topic, however, concluded with the following statement:

> "In short to condemn all of the petitioner's picketing which carries any 'secondary' implications would be to paint with much too broad a brush." At page 390.

To find a violation, this Court has looked to whether the picketing union's objective is essentially directed toward the secondary employers rather than being concerned with the primary employer's operations. In the instant case the only direct evidence as to the union's objective was contained in the statements of its strike director who told the alleged secondary's representative that the picketing would continue as long as Illinois Bell's permanent cable remained in Winston's Tower No. 3. Therefore, it is eminently clear that the union agent was articulating the purpose for the picketing as one directed towards those facilities of Illinois Bell which were part of its day to day operations. The only possible conclusion that could be drawn from the statement of the union spokesman was that when the primary employer's permanent facilities were no longer at the situs, the picketing would cease. This is the clearest form of primary objective that can be imagined.

The only comment by the trial examiner to the union's primary situs argument, was the pragmatic conclusion that if this principle were applied, then public utilities, such as the telephone company, would fall outside the scope of Section 8(b)(4)(B). (See page 12 of Trial Examiner's decision.) The petitioner submits that the nature of the utilities generally, and of Illinois Bell in particular, which render them omnipresent, is not a sufficient basis for denying these employees the right to engage in primary

picketing as specifically guaranteed in Section 8(b)(4)(B). Society's decision to grant the monopoly to a utility cannot serve as a reasonable basis for denying such basic rights to the employees of that monopoly.

In the instant case, the second element of the Court's decisions, viz, that the primary employer's day to day operations are involved, is satisfied by the telephones which were in use after September 27. The Unions submit to the Court that the location of Bell's operating property at Tower No. 3 is sufficient to render that location a primary situs of Bell. However, in addition, Bell was sending its strikebreaking employees onto the situs to perform the struck work. Thus Bell was present at Tower No. 3 in the form of both its permanent physical property and its employees who were performing the work that the strikers would have been doing if they were not on strike. The conclusion is inescapable, that the Winston Muss Tower No. 3 was a primary situs of Illinois Bell at the time of the picketing and therefore permissible under the proviso of 8(b)(4)(B).

II.

The nature of the primary employer herein, Illinois Bell Telephone Company raises a question which was recently considered by this Court, namely, could the cease doing business object exist to satisfy the requirements of Section 8(b)(4). In its decision in *N. L. R. B.* v. *Local 825 Operating Engineers (Burns and Row)*, 39 Law Week 4097; 76 LRRM 2129, the Court concluded that a complete termination of a business relationship between the neutral and the primary employer was not required to amount to a violation of Section 8(b)(4)(B) of the Statute. However, the Court went on to say:

> "Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however,

> clearly protected. *Steelworkers (Carrier)*, 376 U. S. at 492, *Electrical Workers (General Electric)*, 366 U. S. 682. Likewise secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met." See Law Week page 4099 or LRRM page 2131.

The Court went on to find that the union in the *Burns and Row* case, clearly had an object of involving the secondary employers. In the instant case it is submitted that, for the reasons set out in No. I above no such secondary object has been shown.

However, even assuming arguendo, that there is a secondary object, the substantial difference between the nature of the contractor in that case, and the primary employer here, requires a different conclusion when applying the principles of the court's decision in the *Burns and Row* case. The Court's finding that a slight disruption in a business relationship might not amount to a violation certainly is applicable here because in this case the alleged secondary cannot obtain telephone communications from any other source. Therefore, it must ultimately go to Bell for telephone service, after a time delay. Here, the record reflects that the use of strikebreakers by Bell resulted in a time delay of from a few days to less than two weeks. The Petitioner submits that the disruption in telephone service was so slight that it could not satisfy the "cease doing business" object.

Finally, the Petitioners contend that the monopolistic nature of Bell prevents the normal business relationship, which was contemplated by Section 8(b)(4)(B), from coming into existence. Bell retains ownership to all of the properties which it placed upon the facilities of the alleged secondary. Therefore, Winston Muss, did not then engage in any type of business relationship where it purchased properties from Illinois Bell. To the contrary, Muss only

dealt with Bell to arrange for the provision for telephone service to the apartment owners who would purchase the locations in Winston Tower No. 3. Therefore, there was no business relationship, in the normal sense of the word, between Winston Muss and Illinois Bell. At most there was a cooperation between the two in order for Bell to sell its services to the apartment owners.

The Trial Examiner's answer to the obvious lack of a business relationship between Bell and Muss was to point out that the *Denver Building Trades* decision (supra), required a broad application of the provisions of the statute to allow the implementation of a congressional intent to shield unoffending employers. See TX decision, page 9. The Petitioners contend that the Trial Examiner, by using the secondary objective argument, has not supplied the essential requisite of a business relationship between Muss and Bell. Further, the trial examiner's pragmatic conclusion that, to exclude a public utility from Section 8(b)(4)(B) would be contrary to Congressional intent, fails to meet the argument presented by petitioners.

The Trial Examiner finally concluded by saying that even assuming that no business relationship existed, the picketing was secondary because of an alleged object to disrupt the Winston Muss business relationship with its subcontractors. This is a clear instance where the Trial Examiner transposed the alleged secondary, Winston Muss, into the primary employer in his attempt to justify the preconceived conclusion that a violation existed.

Petitioners contend that the nature of Illinois Bell, as a monopoly, takes it outside of that category of employers against whom an object of "cease doing business" could exist. Illinois Bell is different from a private business concern which must face competition from other companies of the same type. The utility, being a monopoly clearly makes

it substantially different from the normal business concern. Thus, it is not proper to apply the same criteria to Bell when the "cease doing business" object is considered.

III.

This Court, in its reference to an ally situation, where the alleged neutral secondary employer has so allied himself with the primary as to be outside the protection of Section 8(b)(4)(B), was in the case of *National Woodworkers* v. *N. L. R. B.*, 386 U. S. 612. In that case the court clearly stated that an employer loses the protection of the statute where he voluntarily entangles himself in the vortex of the primary's dispute. Nowhere below has a consideration of this Court's decision in *National Woodworkers* case (*supra*) been made to the facts of the instant case.

The record below is repleate with instances where Winston Muss voluntarily entangled itself with Bell prior to the strike. Initially, the architects for both companies co-operated concerning the location of Bell's property at Tower No. 3. Subsequently, Winston Muss dug the trench for Bell's main cable that ran to the building. None of these services, including the space for Bell's property in Tower No. 3, resulted in any direct monetary compensation to Winston Muss.

There was no diminution of the co-operation after the strike began but before Tower No. 3 was picketed. Bell was allowed to send its strike breakers into the building on week ends and during the evening and night hours, so that they could do the struck work. It is unclear whether the strike breakers kept this schedule after the picketing began, because of their use of unmarked cars and wearing of business suits on the job. Further, the project manager for Winston Muss told the strike director that he could

guarantee that Bell would perform no more of the struck work. (see TXD page 5.) Either Winston Muss had the complete co-operation of Bell or the project manager was lying to the Union. Finally Winston Muss arranged for the allegedly sick apartment owners to contact the Union for the installation of telephones. This conduct was for Bell's benefit rather than Winston's because these apartments were already sold and the owners were already occupying the property. It is submitted by the Petitioners, that the post picketing conduct of Winston Muss was for the benefit of Bell to the degree that it amounts to a voluntary involvement in the vortex of the dispute.

In order to avoid the finding of an ally situation from the conduct of Winston Muss and Bell, the Trial Examiner concluded that "effectuation of the statutory intent" dictated that Bell was a neutral employer rather than an ally of Winston. (TXD page 12.)[5] Only by ignoring this Court's pronouncement, was the Trial Examiner able to state that the ally doctrine has been applied only where the employer performs the struck work or where the primary and secondary employers have common ownership and control. The petitioners submit that the failure of the Trial Examiner to apply the rationale of *National Woodworkers Manufacturers* decision of this court to the instant case result in a clear conflict with this Court's conclusion that an employer may not retain his neutrality when he voluntarily entwines himself in the vortex of the dispute.

An important factor in determining the question of the ally relationship, is the nature of the business relationship between Bell and Winston Muss. As was noted previously, there was no normal business relationship and, in fact, the

5. It may be assumed that the Trial Examiner inadvertently mixed up the primary and the secondary employer in his statement. It is submitted that this is readily justifiable from the close degree of their cooperation.

Trial Examiner himself noted that there might not have been such business relationship in existence. Obviously if there was no business relationship, there must have been some other relationship. The petitioners submit that the relationship was one of an ally who has voluntarily meshed himself in the dispute of the primary.

IV.

Prior to the hearing at the National Labor Relations Board, the Petitioners served subpoenas upon Illinois Bell Telephone Company requiring their production of company books and records showing the work performed during the strike at Winston Tower No. 3. At the hearing, Illinois Bell produced only one document, which was a copy of a work order for work performed in the installation of telephones in an apartment, used as a sales office by the real estate agent. This work order reflected that this struck work was completed on September 4. The alleged reason for failure to produce any other document from Illinois Bell's records was that all of the installation work performed by the strikebreakers had to be redone, and therefore the original work orders were destroyed.

However, there is absolutely no explanation by the company as to why the service order and billing records were not produced to show the date on which service began in the apartments. The company's witness testified that the installation work could be determined from the service order and/or the billing records (see Tr. 134 and 135).

However, even assuming that the company is correct that all records which showed the work done during the strike were destroyed, the burden for such conduct must fall upon Illinois Bell rather than the petitioning union. As was argued below, the spoliation of evidence due to the fault of the party failing to produce it, must result in a presumption that the evidence would

have disproven the allegations of the party in whose custody it was originally. *29 Am. Jur. Section 177, Modern Federal Practice Digest Evidence Key No. 78.* Thus Illinois Bell's destruction of its records following its filing of unfair labor practice charges on this very point, can only result in a conclusion that those records would have proven Petitioner's contention that strikebreakers continued to work at the project throughout the picketing.

More importantly, this Court has held that failure of a prosecutor to produce evidence at a trial, which is favorable to the accused, violates the due process concept where that evidence is material either to the guilt or punishment irrespective of the good faith or bad faith of the prosecution. *Grady* v. *State of Maryland,* 373 U. S. 83 and *Wade* v. *Jackson,* 256 F. 2d 7, cert. denied 357 U. S. 908. Although the prosecutor in this case, the General Counsel of the Labor Board, was not the party in possession of the evidence, the charging party, Illinois Bell was or should have been in possession of this evidence and its failure to produce must inure to the detriment of the General Counsel.

The serious and detrimental effect of the failure to produce this vital evidence is clearly seen when it is noted that the trial examiner improperly shifted the burden of proof from the General Counsel to the Petitioners. Thus the Trial Examiner found that a violation of the Moore Dry Dock theory's evidentiary presumption took place because of the failure to prove that strikebreakers were present during the entire time of the picketing. Petitioners submit that the burden should have been upon the General Counsel to prove the absence of strikebreakers by means of the best evidence, which would have been the company's books and records regarding work performed. However, even accepting the improper shifting of the burden, as

the Petitioner did, it was the company's failure to produce its books, which kept from the record the best and only reliable evidence as to the extent of the work performed by the strikebreakers during the picketing.

Finally the trial examiner's conclusion that the primary employer, Illinois Bell was not engaged in its normal operations at the site during the time of the picketing ignored the fact that functioning telephones, which were part of the Bell system, were in operation beginning on August 27th and thereafter. In addition, it is clear that strikebreakers continued to perform work during the time of the picketing, at least through September 4.

The trial Examiner then noted that some phones were installed for alleged "emergency cases" which were apartment owners in the building who contended that they had serious cardiac or other medical problems requiring the use of the telephone. Apparently the trial examiner considered the installation of these so-called emergency cases to be other than a matter of Bell employees being present and performing the normal business of the company.

It is submitted that the installation of telephones for these emergency cases amounted to one type of the normal business operations of the company. Further, once the telephones were placed in the apartments, then the calls placed over these phones would clearly be the normal business operations of the company.

Neither the Trial Examiner nor the Board have commented upon the argument made by the union that Bell's failure to produce the records, which allegedly were lost or destroyed, must be held to be the fault of the party who had them originally in their possession. The Court of Appeals opinion stated that the explanation for Bell's failure to produce its records is adequately set forth by the Trial Examiner in footnote 8. However, footnote 8

only refers to the alleged re-working of all the phones put in by the strike breakers.[6] Thus, there is, to date no explanation for the failure of Bell to produce its service orders or billing records.

Petitioners submit that Bell's failure to produce its records resulted in a violation of due process because of the subsequent finding of a violation based upon the evidentiary presumption of the Moore Dry Dock theory.

CONCLUSION.

Wherefore, for the above and foregoing reasons, petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

ROBERT E. FITZGERALD, JR.,
ANNA R. LAVIN,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Petitioners.

6. This representation was unsupported by any of the "new" work orders that resulted from the alleged reworking.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

September Term, 1970—September Session, 1970.

No. 18095
LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; and LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

OCTOBER 23, 1970.

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and FAIRCHILD, *Circuit Judge.*

PER CURIAM. Locals 134 and 135, International Brotherhood of Electrical Workers, AFL-CIO, seek to set aside an order of the National Labor Relations Board wherein the unions are ordered to cease and desist from engaging in secondary boycott activity in violation of the provisions of section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(i) and (ii)(B). The Board's order and decision together with the trial examiner's decision are reported at 179 N. L. R. B. No. 33 (1969). The Board has cross-petitioned for enforcement of the order.

We are of the view that there was substantial evidence before the Board that the unions, by their picketing and other conduct, induced or encouraged employees of neutral or secondary employers to engage in a strike or refusal to perform services, all with an object to force or require the secondary employer Winston to cease doing business with Illinois Bell Telephone Company, the primary employer.

The trial examiner in his decision, which was adopted by the Board, analyzed and treated the various defenses asserted by the unions and reasserted in this review. The Board properly overruled these defenses. Since we agree with the trial examiner's analysis and discussion of these contentions, we think no purpose could be served by further discussion except in one particular.

The unions stress in this review an alleged denial of due process in the proceeding before the examiner. They claim they were prejudiced by Bell's failure to respond adequately to subpoenas issued for its records showing what work was performed by Bell at the site during the secondary picketing. The explanation for the failure to supply the records requested in the subpoenas is fully covered in the record and is noted in footnote 8 in the examiner's decision. The explanation was reasonable and adequate. Under the circumstances, the failure to produce the records raised no presumption that Bell performed any additional work at the site other than that disclosed by the evidence in the record.

The petition for review is denied and the Board's order will be enforced.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.
Chicago, Illinois 60604.

Friday, October 23, 1970.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge.*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge.*

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for review of an order of the National Labor Relations Board.

No. 18095

This cause came on to be heard on the petition to review and set aside an order of the National Labor Relations Board, respondent's answer thereto, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board entered in this cause on October 17, 1969, be denied, with costs, and the Board's order will be enforced, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Monday, November 16, 1970.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN S. HASTINGS, *Sr. Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 18095

Petition for review of an order of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. The transcript of proceedings before the N. L. R. B. filed in this court February 9, 1970;
2. The Exhibits in the proceedings before the N. L. R. B. filed in this court February 9, 1970;
3. The Opinion of this court, filed October 23, 1970;
4. The Judgment of this court, entered October 23, 1970; and
5. The Order of this court denying Petitioner's Petition for Rehearing, entered on November 16, 1970.

Cause No. 18095

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of February, A. D. 1971.

/s/ KENNETH J. CARRICK,/WHP
Kenneth J. Carrick/whp
Clerk of the United States Court of Appeals for the Seventh Circuit.

[SEAL]

APPENDIX E.

179 NLRB No. 33 D-3281
72-1422 Chicago, Ill.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and ILLINOIS BELL TELEPHONE COMPANY.	Case 13-CC-619.

DECISION AND ORDER.

On June 11, 1969, Trial Examiner Samuel M. Singer issued his Decision in the above-entitled proceeding, finding that the Respondents[1] had engaged in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, the Charging Party filed cross-exceptions to the Trial Examiner's Decision, a brief in support of cross-exceptions and in reply to the Respondents' exceptions, and a brief in support of the Trial Examiner's Decision. The Respondents filed a brief in answer to cross-exceptions.

1. At the hearing, the Trial Examiner granted the General Counsel's motion to dismiss the complaint insofar as it applied to the International. Accordingly, "Respondents" hereinafter is used to refer to Locals 134 and 165.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the cross-exceptions, the briefs, and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondents, Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Local 165, International Brotherhood of Electrical Workers, AFL-CIO, their officers, agents, and representatives shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

FRANK W. MCCULLOCH,
Chairman

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

NATIONAL LABOR RELATIONS BOARD.

(SEAL.)

2. We hereby correct the Trial Examiner's inadvertent reference to the "1200' Bell employees to read "12,000," in Section III, A of his Decision.

TXD—307—69
Chicago, Ill.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Division of Trial Examiners

Washington, D. C.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Respondents*, and ILLINOIS BELL TELEPHONE COMPANY, *Charging Party*.	Case 13-CC-619.

Robert P. Henderson, Esq., of Chicago, Ill., for the General Counsel.

Robert E. Fitzgerald, Jr., and *Anna R. Lavin, Esqs.*, of Chicago, Ill., for Respondents.

Gordon W. Winks and *Roddy P. Biggert, Esqs.*, of Chicago, Ill., for the Charging Party.

TRIAL EXAMINER'S DECISION.

SAMUEL M. SINGER, Trial Examiner: This proceeding, tried before me in Chicago, Illinois, on March 26 to 27, 1969, pursuant to a charge filed on August 28 and complaint issued on September 12, 1968, concerns allegations that Respondents violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, by engaging in

certain secondary boycott activities. In essence, the complaint alleges that Respondent Locals 134 and 165,[1] by picketing a construction project (Winston Tower No. 3, in Chicago), induced and encouraged employees to engage in work stoppages, and threatened, restrained, and coerced persons engaged in commerce, with an object of forcing or requiring Winston Gardens, Inc., Winston-Muss Corporation, their subcontractors, and other neutral employers to cease doing business with the Charging Party (Bell Telephone).

All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Briefs were received from all. Upon the entire record[2] and from my observation of the witnesses, I make the following:

Findings and Conclusions.

I. The Business of the Employers Involved.

Bell Telephone, an Indiana corporation, with its principal office and place of business in Chicago, Illinois, and branch offices and places of business in Illinois and Indiana, is engaged in the business of providing telephone services as part of a nationwide telephone system. During the 1968 calendar year, a representative period, it derived gross revenues in excess of $1 million from communication services between points within Illinois and Indiana and points in other States.

Winston Gardens, an Illinois corporation, with its principal office and place of business in Palatine, Illinois, is a wholly owned subsidiary of Winston-Muss, the owner of

1. At the hearing I granted General Counsel's motion to dismiss the complaint insofar as it applied to the International (International Brotherhood of Electrical Workers, AFL-CIO).

2. Transcript corrected by my order on notice dated May 16, 1969.

the Winston Tower No. 3 construction project.[3] During the calendar year 1968, Winston and its subcontractors at that construction project received and used there materials and supplies valued in excess of $50,000, shipped directly from points outside Illinois.

I find that Bell Telephone, Winston-Muss, and Winston Gardens at all material times have been persons engaged in commerce or industries affecting commerce within the meaning of the Act, and that assertion of jurisdiction here is proper.

II. The Labor Organization Involved.

Respondent Locals 134 and 165 (herein collectively referred to as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. *Background; Bell's Work at Construction Project.*[4]

On May 8, 1968,[5] the approximately 1,200 Bell employees represented by the Union commenced a strike against Bell in support of economic demands in mid-contract negotiations under the wage reopener clause in the subsisting collective agreement. Bell's main facilities in Chicago, "as well as other projects" where Bell did business, were picketed until September 23. As presently indicated, the

3. Because of the identity of their interests, Winston Gardens and Winston-Muss will usually be referred to collectively as Winston,

5. Unless otherwise indicated, all dates are 1968.

4. The findings in this and subsequent sections are based on uncontradicted testimony and stipulations. Respondents did not call any witnesses, but cross-examined witnesses called by General Counsel.

picketing of the project here involved (Winston Tower No. 3) began on August 27 and ended on September 6.[6]

Winston Tower No. 3 is one of a complex of four apartment condominiums, costing an estimated $5 to $6 million to build. Owners of the apartment ("tenants") began moving into the building on July 1. By August 24, 100 to 150 of the 251 apartments were occupied, none with telephone connections. Winston Project Manager Speer credibly testified that prior to that time he had received "numerous calls from occupants of the building that they had heart trouble and so forth" and wanted telephones, but that he advised the tenants that "due to the fact that there was a strike on, there was nothing [he] could do for them."

After a preliminary investigation of the project on Friday, August 23, Bell Plant Engineer Brown and 11 other supervisory employees went to the project on Saturday and Sunday (August 24 and 25) to complete the necessary work to provide telephone service. During the 12 hours (starting at 8 a.m.) on each of these days, the crew uncoiled the "main" cable (previously installed, *infra*) and fastened it to a basement wall. They then proceeded to do the cable and conduit work, preparatory to installing telephone instruments. This work and that presently described (*infra*) admittedly was of the type ordinarily performed by the strikers.

Bell had undertaken to prepare and provide telephone service for the Winston project as early as March 1967,

6. Prior to September 6, the Regional Director filed, pursuant to Section 10(1) of the Act, a petition with the United States District Court for the Northern District of Illinois (Eastern Division) to enjoin the picketing. Without taking evidence, the Court, on assurances from the parties that the picketing had ceased, ordered "the cause stricken from the calendar without prejudice and with leave to reinstate on motion of any party."

when Winston's architect (Barbanel) requested Bell Plant Engineer Maierhofer "for a conduit recommendation." The latter thereupon visited the project and conferred with Winston's then Project Superintendent (Sussman) "at least a couple dozen times" regarding the layout of the work to be done—including the location of the main cable and time of its installation. Winston's architect and Bell personnel would exchange diagrams and blueprints and discuss the problems that came up. Thus, after consultations, it was agreed to relocate the path of the underground service ("main") cable from one end of the project to another, in order to save on the amount of trenching. Winston in effect gave Bell an "easement" for the main cable and dug the trench for it without charge. It also furnished (free of charge) interior space, closet space, user shafts, and conduit. The cable and other telephone equipment remained Bell property. These arrangements between Winston and Bell were in keeping with practices followed by Bell at other projects involving other builders.

On Monday, August 26, at around 5:30 p.m., the Bell crew returned to the project. By 1:30 a.m. (Tuesday) they had completed the cable work, placed the conduits going to the apartments, and installed telephones for six occupants whom Winston regarded as "emergency" cases: two physicians, a pharmacist, and three cardiacs. Bell Plant Engineer Brown testified that he purposely got to the project after 5:30 p.m. so that his crew "wouldn't be there when the trades are there." No employees of other employers were on the scene when the work was performed.

B. *The First Day's (August 27) Picketing; the Union's "Threat" to Winston.*

Between 8:30 and 8:45 a.m. on Tuesday (August 27), pickets from Locals 134 and 165 began to patrol the intersection of Kedzie Avenue and the private driveway, the sole vehicular entrance of Winston Tower No. 3, wearing apron-type signs, reading:

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
AFL—CIO

ON STRIKE

AGAINST
ILLINOIS BELL
TELEPHONE
COMPANY

The pickets stopped to talk with drivers bringing supplies (such as kitchen equipment), telling the drivers that they were "on strike against Illinois Bell" and requesting them to "recognize their picket line." The drivers "backed off and went on [their] way," without making deliveries. The pickets also spoke to drivers of trucks servicing residents of Winston Tower No. 3, including cleaning, diaper service, and maintenance truckdrivers. Some of these, however, crossed the picket line. Employees of the general contractor (Winston Gardens) and of its subcontractors (electricians, tilemen, etc.), who had commenced working before the pickets arrived, continued to work the entire day. The pickets remaind at the project until 4:15 or 5 p.m. No Bell employees worked at the project during these hours. Winston Project Superintendent Speer credibly testified that after the picketing started he "made certain"

that no telephone work "would be done," by requesting Bell not to further schedule such work.

At around 11 a.m. on the same day (August 27), Speer telephoned the Union's "strike director" Ahern, asking him "the reason" for the picketing. Ahern said that "work was done by the Bell people over the weekend, and that was the reason for the pickets being out there." When Speer explained that the six telephones installed were for cardiacs, physicians, and pharmacists, Ahern stated that his "main complaint" related to the cable work done over the weekend "which was permanent installation."

Around 3 p.m., Speer again telephoned Ahern, complaining that he "was bottling up the job and putting [him] in a bad condition." He offered "to send [Ahern] a letter guaranteeing, from this time on, until such time as the strike ended, that there would be no . . . Bell . . . employees allowed on my property." Ahern answered that he was "very sorry, but he could not go along with that," adding that "the pickets would continue . . . until the permanent installation that the Bell people had installed on the previous Saturday and Sunday was disconnected and removed from the job." He went on to say that he would have had "no complaint" about the telephone installations for the six individuals if the Company had hung only "temporary cable from . . . the main line on Kedzie, through the windows of the individual apartments."

Speer again telephoned Ahern at around 6 p.m., asking "if there was any possibility about . . . removing the pickets the following morning." Ahern replied, "No, that they would be there." Thereupon Speer made "a proposal" that if Ahern or one of his men "would come out and give an estimate of a time, manhours, costwise . . . that was spent by Illinois Bell during this two-day period, [Speer] would reimburse it into the Union fund or strike

fund," Ahern replied, "Positively not, that no deals could be made," repeating his earlier statement that "the only way the pickets could be removed would be to remove the permanent installation . . . from the job."

C. *August 28—September 6 Picketing.*

The Union again picketed the project on the next day (Wednesday, August 28) from around 7:15 a.m. to 4:30 p.m. Close to 100 employees of the general contractor (Winston Gardens) and its subcontractors were scheduled to work on that day: 15 to 20 carpenters and laborers for Winston; 35 to 40 for M. Ecker (painting and drywall contractor); 15 or 16 for Coleman Floor (ceramic and resilient tile contractor); 5 or 6 for Nadolna Brothers Plumbing; 5 or 6 for R. Martin and Company (heating and ventilating contractor); and 12 to 15 for United Light (electrical contractor). However, only Nadolna's five or six plumbers, already on the project when the pickets arrived, worked that day. The others, who arrived after the picket (between 7:30 and 8 a.m.), "just didn't attempt to cross the picket line." As on the previous day, no Bell employees were at the project.

As previously noted, the Union continued to picket through Friday, September 6. No craftsmen worked on Thursday, August 29; 15 to 20 percent of those scheduled to work on the next day (August 30) were on the job. By the end of that week (September 6) half of the men scheduled on the project reported for work. Apparently in the meantime,[7] Speer, who had been under "pressures" from cardiac patients and other tenants for telephone service, prevailed upon Ahern (the Union's strike director) to approve telephone installations in emergency

7. Project Superintendent Speer could not fix the date, but the context indicates that it was before the picketing ceased on September 6.

cases. Ahern agreed "to cooperate" as regards those "that are desparately [sic] in need of phone service . . . providing the customer would contact Mr. Ahern or one of his assistants and get approval." Under the agreed procedure, the Union would notify Speer's office of its "approval" and it, in turn, would convey the information to Bell Telephone which would then make the installation. Bell Plant Engineer Brown testified that his crew alone installed 25 or 30 telephones in "emergency cases"—all during regular daytime hours.[8]

D. *Analysis and Conclusions.*

As found, after unsuccessful contract negotiations, the Union on May 8, 1968, called a strike against Bell. On August 24 through August 26 (Saturday through Monday), Bell managerial employees completed the cable work and installed six telephones at the Winston project (Winston Tower No. 3). From August 27 through September 6, the Union picketed the project, the common worksite of various secondary or neutral employers, including Winston Gardens (general contractor) and its subcontractors. As a result, employees of these secondary employers refused to perform services. In issue here is whether the picketing and other

8. The record does not disclose the total number of installations (including those pursuant to Union "approval") made by Bell during the strike. Project Superintendent Speer testified, and counsel for Bell (in explaining Bell's inability to comply with a subpena calling for records) maintained, that no such records were available—Speer averring that Winston never kept records thereon and Bell's attorney asserting that work orders on special jobs were later replaced by new work orders (since "all of this work has been redone since then"), the original orders then being destroyed in accordance with "routine" procedure. Respondents produced one work order showing installation of two telephones around September 4 for the building manager handling maintenance (Arthur Rubloff Company) which Speer regarded as special work, and "very important" for emergencies as in the case of "a fire." Bell Plant Engineer Brown testified that this installation was done after 5:30 p.m. when no pickets were around.

conduct engaged in by the Union constituted proscribed secondary activity within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act. For reasons stated below, I find that they did.

1. Section 8(b)(4)(i) and (ii)(B), insofar as here relevant, prohibits a union or its agents from inducing or encouraging employees of a secondary employer to refuse to handle products or perform services, and from threatening, restraining, or coercing secondary employers, where an object of such conduct is to force or require a secondary employer to cease doing business with the primary or disputing employer. Thus, a violation under these statutory provisions requires two elements: (1) an object to bring about a cessation of business between the primary and secondary employers; and (2) inducement of secondary employees and coercion of secondary employers to achieve the proscribed objective.

2. Based on the entire record, I find that an object of the picketing was the involvement of neutrals such as Winston Gardens and its subcontractors in the Union's dispute with Bell, in order to force Winston to cease doing business with the primary employer by bringing illegal pressures on Winston and its subcontractors. In *Moore Dry Dock Company,*[9] the Board set down the criteria, which since have been "widely accepted by reviewing federal courts" (*Local 761, IUE* v. *N. L. R. B.*, 366 U. S. 667, 677), for determining when picketing at a common or mixed situs may be presumed to be for a primary or secondary objective. In order to qualify as primary picketing under these established criteria, it must appear, among other things: (a) that the "picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises"; and (b) that "at the time of the picketing the

9. *Sailor's Union of Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549.

primary employer is engaged in its normal business at the *situs*."[10] The picketing here failed to meet both of these requirements. The undisputed evidence establishes that no Bell employees were on the jobsite and that Bell was not engaged in its normal business there during the picketing (August 27 to September 6). Indeed, as soon as the picketing commenced, the general contractor (Winston Gardens) "made certain" that no Bell work was to be performed on the premises by requesting the primary employer not to schedule additional work. Cf. *Painters District Council No. 38 (Edgewood Contracting Co.)*, 153 NLRB 797, 800. The Union nonetheless insisted on picketing the project even though the project superintendent offered to "guarantee" that no Bell personnel would be allowed thereon until the strike ended. Nor did the Union accept the project superintendent's offer to reimburse the Union for the financial loss its members might have incurred because of Bell's cable work during the strike, insisting that the secondary employer (Winston) dismantle and remove it as a condition to withdrawing the pickets. The Union thus brought home to the secondary employer the danger of doing business with Bell, demonstrating thereby that it was being punished for allowing the primary employer to work on the jobsite, irrespective of time and circumstances. Apart from disclosing a secondary objective, the Union's action was

10. The other requirements are that the picketing be limited to places reasonably close to the situs of the dispute; and the picketing disclose clearly that the dispute is with the primary employer. Although the *Moore Dry Dock* standards "are not to be applied on an indiscriminate '*per se*' basis" (*International Brotherhood of Electrical Workers, Local Union 861 (Plauche Electric, Inc.)*, 135 NLRB 250, 255), noncompliance of the picketing therewith "justifies a presumption or an inference that the picketing at the mixed situs has an illegal secondary object," thus placing the burden on the union to rebut the presumption. *Glass Workers Local Union 1892, Brotherhood of Painters, Paperhangers and Decorators of America, AFL-CIO (Frank J. Rooney, Inc.)*, 141 NLRB 106, 115.

tantamount to a threat to continue the picketing unless the permanently installed cable was removed—a threat in itself constituting a violation of Section 8(b)(4)(ii)(B). See *International Hod Carriers, Local No. 1140 (Gilmore Construction Company)*, 127 NLRB 541, 545; *Local 575, International Brotherhood of Teamsters (Dierick Vending Co., Inc.)*, 141 NLRB 592, 597; *Local No. 41, International Brotherhood of Electrical Workers (New York Telephone Company)*, 162 NLRB 620, 624.

Under all the circumstances I find that an object of the picketing was to implicate neutral employers in the Union's dispute with Bell, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

3. It is equally clear that by its picketing and verbal appeals to secondary employees to respect the picket line, the Union induced and encouraged employees of secondary employers to withhold their services. "The normal purpose of a picket line is to persuade employees not to cross it." *N. L. R. B.* v. *Dallas General Drivers, Local No. 745*, 264 F. 2d 642, 648 (C. A. 5). See also *Printing Specialties Union* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). The Union's conduct also constituted restraint and coercion of neutral employers doing business at the jobsite, particularly of neutrals whose employees engaged in work stoppages which prevented the employers from carrying on their usual business at the jobsite. See *International Hod Carriers, Local No. 1140 (Gilmore Construction Co.), supra*, 127 NLRB 541. Indeed, the picketing here would have constituted unlawful inducement and coercion even if it had failed of its objective; i.e., if the secondary employees had not withheld their services. See *N. L. R. B.* v. *Associated Musicians, Local 802*, 226 F. 2d 900, 904-905 (C. A. 2).

4. The Union's major contention (br. pp. 8-10) is that Section 8(b)(4) of the Act is inapplicable here since no

"cease doing business" object was present. The Union argues that this section was designed "to protect the commercial relationships between competitive entities who face the rigors of the market place" and not "a monopoly," like Bell, "with no competition in the field of telephonic communications." It claims that Bell was doing business "with the apartment owners who subscribed to the telephone service" and not with Winston (br. p. 10). In short, the Union contends that this case does not present "a typical common situs situation" (br. p. 13) to which the *Moore Dry Dock* criteria apply.

I do not agree. As the Board and courts have repeatedly indicated, the term "doing business" must be construed broadly, in order to effectuate the Congressional intent of "shielding unoffending employers and others from pressures in controversies not their own." *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692.[11] "The Board and courts have held that 'the victim's neutrality' is 'conceived to be the central element of Congressional concern in this area' and that Congress did not intend to confine Section 8(b)(4) to a strict and precise definition of terms which would limit its application in protecting neutral employers." *Salem Building Trades Council, supra*, 163 NLRB No. 9. That a "business relationship" existed between Bell (the primary employer) and Winston (the secondary employer) is established by the frequent consultations and dealings between them. Even before the telephone subscribers became known, representatives of the two employers conferred about the location of the Bell telephone cables and equipment on the project.

11. See also *Salem Builders Trades Council, AFL-CIO (Cascade Employers Association, Inc.)*, 163 NLRB No. 9, enfd. 388 F. 2d 987 (C. A. 9); *Sheet Metal Workers International Association, Local Union No. 295*, 131 NLRB 1196, 1199; *International Brotherhood of Electrical Workers, Local 501* v. *N. L. R. B.*, 181 F. 2d 34, 37 (C. A. 2), affd. 341 U. S. 694.

Plans and diagrams were prepared by Bell engineers and submitted to Winston's architect for approval. As the job progressed, employees of Winston and its subcontractors used the wiring and other work specifications set out on the diagram in guiding and laying out their own work. In accordance with custom, Winston did the trenching for the main cable and furnished interior space, riser shafts, and conduit for Bell equipment and cables while Bell supplied the materials (including telephone instruments). Bell also did the cable work, wiring, and other installation. To be sure, neither paid the other for materials and services, but this does not mean that they were not "doing business" with one another. The mutual benefits they derived furnished adequate consideration for their arrangement. Insofar as Winston was concerned, telephone service to prospective tenants was an important factor in renting or selling its apartments.

To exclude dealings with a public utility such as Bell from the protective scope of Section 8(b)(4), as the Union would do, would indeed carve an important exception to the section. Neither legislative history, decisional precedent, or logic warrants such construction.[12] To the contrary, the Board has in the past found labor organizations in violation of Section 8(b)(4) for disrupting or interfering with dealings between neutrals and public utilities, such as telephone companies. See *Local No. 41, International Brotherhood of Electrical Workers, AFL-CIO (New York*

12. As stated in *Department Specialty Store Employees' Union, Local 1265* v. *N. L. R. B.*, 284 F. 2d 619, 626 (C. A. 9): "We must keep in mind that this type of legislation is remedial in character and is to be broadly and liberally construed to accomplish its intended purpose. . . . It is the judicial responsibility of the courts to find that interpretation, in this type of legislation, which can most fairly be said to be imbedded in the statute in the sense most harmonious with its theme and with the general purposes which Congress has manifested. . . . In construing a statute the mischief sought to be remedied should be considered."

Telephone Company), 162 NLRB 620; *International Brotherhood of Electrical Workers, Local Union No. 11 (General Telephone Company)*, 151 NLRB 1490; *Local No. 3, International Brotherhood of Telephone Workers (Campanella Corporation)*, 175 NLRB No. 118.

In any event, assuming, *arguendo*, no "business relationship" between Bell and Winston, the picketing here nonetheless was secondary and unlawful, an object thereof having been to disrupt Winston's business relations with its subcontractors. A business relationship between primary and neutral employers is not a *sine quo non* for a secondary boycott. As stated in *Miami Newspaper Pressmen's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405, 410 (C. A. D. C.), affg. 138 NLRB 1346, 1353: "Although it is frequently true that the object of secondary picketing is to obstruct dealings with the primary employer, Congress did not so limit its language. . . . [T]he central legislative purpose . . . was to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers. . . . Many secondary employers would have no occasion to have commercial intercourse with the primary employers."

Accordingly, I reject the Union's contention that the picketing here was privileged because a "cease doing business object" did not exist.[13]

5. The Union also contends (br. p. 11) that here "there is an ally situation between Winston . . . and Illinois Bell which would take the picketing outside the prohibition of

13. In view of the above findings, I need not pass upon the further question whether the picketing was unlawful because an object thereof was to cause a cessation of business between Bell (the primary employer) and occupants of the building (apartment purchasers in the condominium) who ordered telephone service. It would appear, however, that these tenants qualify as "persons" entitled to be free from the coercive pressures proscribed by Section 8(b)(4). See footnote 11, *supra*.

8(b)(4)." Pointing to the "cooperation" between Bell and Winston in drawing "plans for the locations of the telephone property," in placement of such property (cables, wires, and telephones) "throughout the facilities of Winston Tower No. 3" by "easement," in scheduling Bell work "at the convenience of both companies before the strike began," and in Winston's permitting "the strikebreakers" to perform during the strike, the Union argues (br. p. 12) that Winston "voluntarily allowed itself to become enmeshed in the labor dispute by knowingly assisting the struck work."

The contention is without merit. The "ally" doctrine has heretofore been applied to situations: (1) where a secondary employer performs "struck work," i.e., work which, but for the labor dispute the primary's employees would ordinarily perform; or (2) where the operations of the secondary and primary employers are commonly owned and controlled to such an extent that the two may be regarded as a single-employing enterprise.[14] In these cases the secondary employer loses its protected neutral status under Section 8(b)(4). Neither situation is present here. Common ownership and control is not claimed and there is not a scintilla of evidence that Winston performed, attempted to perform, or was capable of performing the struck work. The fact that Winston may have "cooperated" with Bell in providing telephone service to the tenants—by scheduling the Bell work and allowing Bell management employees access to the property during the strike—is not crucial. Winston's interest in completing the job was no different from that of any other victim of a secondary boycott who deals at arm's length with a dis-

14. See *N. L. R. B.* v. *Business Machine and Office Appliance Mechanics, Local 459*, 228 F. 2d 553, 557-559 (C. A. 2); *Bachman Machine Co.* v. *N. L. R. B.*, 266 F. 2d 599, 603-605 (C. A. 8); *Miami Newspaper Pressmen's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405, 409-410 (C. A. D. C.).

puting employer (e.g., a general contractor doing business with a picketed nonunion subcontractor on a construction site). Nor, in the circumstances of this case, is it determinative that Winston sanctioned placement of Bell property "throughout" the plant and, as is customary in telephone installations, that Winston granted Bell certain "easements." Although "there are many situations in which the answer to a dispute under [8(b)(4)(B)] is easily derived by the application of such legalistic formulae as 'independent contractors,' 'co-employers,' or 'allies.' . . . it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts in the case." *Local No. 24, International Brotherhood of Teamsters* v. *N. L. R. B.*, 266 F. 2d 675, 680 (C. A. D. C.); *Building Service Employees International Union, Local 32—J.* v. *N. L. R. B.*, 313 F. 2d 880, 883 (C. A. D. C.). Effectuation of the statutory intent here dictates the conclusion that Bell was a neutral employer rather than an "ally" of Winston.

6. The Union's remaining contentions require only brief treatment. Its claim that the Winston project was the "primary situs of Bell" (br. p. 7), because Bell retained title to property (cables, wires, etc.) incorporated into the building, is tantamount to a claim that public utilities such as telephone companies (and others such as gas and electric companies retaining possession or title to similar equipment) fall outside the protective scope of Section 8(b)(4), a claim already rejected. In any event, common situs picketing when no primary employees are on the scene does not become primary action merely because property of the primary employer is present. *The Columbus Building and Construction Trades Council, AFL-CIO (Merchandise Properties, Inc.)*, 149 NLRB 82, 91, enfd. *sub nom. International Brotherhood of Electrical*

Workers Local Union No. 683, 359 F. 2d 385 (C. A. 6); *International Brotherhood of Electrical Workers, (Plauche Electric, Inc.)*, 142 NLRB 1106, 1109, enfd. 353 F. 2d 736 (C. A. 5).

As to the Union's claim (br. pp. 13-14) that its picketing after Bell personnel ceased working at the project (on Monday, August 26) was lawful—because the Union was allegedly "unable to ascertain" when Bell personnel would reappear, particularly since they traveled in unmarked vehicles— it is evident that the Union was in truth indifferent and unconcerned about Bell's work schedule. To begin with, it made no attempt to learn if Bell scheduled further operations. Cf. *Local Union 469 of the United Association of Journeymen (Hansberger Refrigeration & Electric Co.),* 135 NLRB 492, 493; *Office & Professional Employees, Local No. 3 (American President Lines, Ltd.),* 156 NLRB 1342, 1344 (1966). More importantly, it had no reason to believe that the Bell work, previously confined to weekend and weekday evening hours, would be continued during daytime (7:30 a.m. to 5 p.m.) hours when the craftsmen of the secondary employers were on the job. Other factors, including the Union's refusal to discontinue the picketing until the completed Bell cable work was dismantled and removed, point to a secondary objective. The instant case does not present a situation, like that relied on by the Union, where the primary employer continued to engage in normal operations at the common situs during intermittent and temporary absences of primary employees.[15]

Finally, for reasons already indicated, I reject the Union's contention (br. p. 10) that the objective of its

15. See *Plauche Electric, supra,* 135 NLRB 250, 255; *International Brotherhood of Electrical Workers, Local 861, AFL-CIO (Brownfield Electric, Inc.),* 145 NLRB 1163; *New Power Wire & Electric Corp.* v. *N. L. R. B.,* 340 F. 2d 71, 74 (C. A. 2).

picketing "was in reality" nothing more than "one of advertising to the public the fact of its dispute with the primary employer, Bell." See *Local Union No. 519, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (H. L. Robinson and Associates)* v. *N. L. R. B.*, 70 LRRM 3300, 3304 (C. A. D. C.). Moreover, it is clear that "an object" of the picketing, even if not the sole one, was secondary and unlawful. See *N. L. R. B.* v. *Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 689.

For all of the foregoing reasons I find and conclude that the Union violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Conclusions of Law.

1. Local 134 and Local 165 are labor organizations within the meaning of Section 2(5) of the Act.

2. Bell Telephone, Winston Gardens, and Winston-Muss are employers engaged in commerce or industries affecting commerce within the meaning of Sections 2(2), (6), and (7) and 8(b)(4) of the Act.

3. By engaging in, inducing or encouraging individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal to perform services, and by threatening, coercing, or restraining persons engaged in commerce or in an industry affecting commerce with the object of forcing or requiring Winston Gardens and Winston-Muss to cease doing business with Bell Telephone, the Respondents have violated Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY.

Having found that Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend the customary cease-and-desist order and the usual affirmative relief ordered in cases of this nature, including posting of notices.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following:

RECOMMENDED ORDER.

Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Local 165, International Brotherhood of Electrical Workers, AFL-CIO, their officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Winston Gardens, Inc., Winston-Muss Corporation, or any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Winston Gardens, Inc., Winston-Muss Corporation, or such other person to cease doing business with Illinois Bell Telephone Company.

(b) Threatening, coercing, or restraining Winston Gardens, Inc., Winston-Muss Corporation, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Winston Gardens, Inc., Winston-Muss Corporation, or such other

person to cease doing business with Illinois Bell Telephone Company.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their offices and meeting halls copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by their authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish said Regional Director with signed copies of the aforesaid notice for posting by Winston Gardens, Inc., and Winston-Muss Corporation, they being willing, at places where they customarily post notices to their employees.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[17]

Dated at Washington, D. C.

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16. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

17. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith."

APPENDIX.

Notice to All Members of Local 134, International Brotherhood of Electrical Workers, AFL-CIO; and Local 165, International Brotherhood of Electrical Workers, AFL-CIO.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage employees of Winston Gardens, Inc., Winston-Muss Corporation, or any other person engaged in commerce or in an industry affecting commerce to strike, picket, or refuse to perform services, where an object thereof is to force or require such corporation or person to cease doing business with Illinois Bell Telephone Company.

WE WILL NOT threaten, coerce, or restrain Winston Gardens, Inc., Winston-Muss Corporation, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such corporation or person to cease doing business with Illinois Bell Telephone Company.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

.....

(Labor Organization)

Dated..... By .....

(Representative) (Title)

LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

.....

(Labor Organization)

Dated..... By .....

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U. S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7570.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1357

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; AND LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD AND ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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